

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 28, 2021 at 11:30 a.m.

1.	<u>20-25398</u>-E-11	ALEJANDRO ALEJANDRO/ GRISELDA GONZALEZ Eric Wood	CONTINUED APPROVAL OF CHAPTER 11 DISCLOSURE STATEMENT FILED BY DEBTORS' 7-19-21 [63]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on July 20, 2021. By the court's calculation, 65 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b) (requiring twenty-eight days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion to Approve Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Disclosure Statement is XXXXXXX .

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: December 1, 2020

Background: This case involves the Debtors' Alejandro C. Alejandro and Griselda Gonzalez ("Debtor") second mortgage and an old Chapter 7. In 2010, Debtor filed a Chapter 7 and received a discharge.

The original second mortgage lender, Cal State 9, was listed in the schedules. After completion of the Chapter 7 case, Debtor states that no monthly statements from Cal State 9 were received by Debtor. Debtor assumed the mortgage "was no longer a concern."

In 2019, Debtor received a "notice and intent to foreclose." To prevent foreclosure, Debtor filed for Bankruptcy.

Creditor/Class	Treatment	
Class 1A: SPS	Claim Amount	\$361,079.03
	Impairment	No
Class 1B: Franklin Credit	Claim Amount	\$162,370.24
	Impairment	Yes
	Interest Rate: 4.27%; \$873.13 per month; 360 months term	
Class 2A: None	Claim Amount	
	Impairment	
Class 2B: Wells Fargo Bank, N.A.	Claim Amount	\$2,500.00
	Impairment	Yes
	Amount to be paid: \$0.00	
Class 2B: Mellen Law Firm	Claim Amount	\$1,000.00
	Impairment	No

A. C. WILLIAMS FACTORS PRESENT

 Y Incidents that led to filing Chapter 11

 Y Description of available assets and their value

 N Anticipated future of Debtor

 Y Source of information for D/S

☐Y ☐Disclaimer

☐Y ☐Present condition of Debtor in Chapter 11

☐Y ☐Listing of the scheduled claims

☐Y ☐Liquidation analysis

☐N ☐Identity of the accountant and process used

☐Y ☐Future management of Debtor

☐Y ☐The Plan is attached

In re A. C. Williams Co., 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

OBJECTIONS

Bosco Credit LLC, Secured Creditor

Bosco Credit LLC, Creditor with secured claim classified as Class 1B (“Creditor”), is objecting to Debtor’s proposed combined plan of reorganization for the following reasons:

- (1) Debtor have failed to provide “adequate information” as required by 11 U.S.C. § 1125(b); and
- (2) Debtor’s proposed interest rate of 4.25% does not propose a fair and equitable treatment of Creditor’s claim as required by 11 U.S.C. § 1129(b)(2)(A).

Dckt. 70.

Adequate Information

Regarding Debtor’s lack of adequate information, Creditor claims Debtor has failed to remit a payment to Creditor since June of 2008. Additionally, Debtor has failed to make post-petition payments and has accrued interest on the loan since the filing date.

The “adequate information” believed to be missing is that Debtor does not state how Debtor will make the payments on the restructured debtor. The Objection does not address what information is in, or missing from, the proposed Disclosure Statement concerning Debtor’s income, expenses, and payments. Rather, Creditor’s general conclusion that since it hasn’t been paid since June 2008, the Disclosure Statement is inadequate.

The Objection then make the legal conclusion that Debtor has failed to account for the post-petition payments and accrued interest on the date of filing, and Creditor does not consent to such treatment.

The plan fails to cure the default and provides for a new thirty-year loan without adequate interest.

Interest Rate

Regarding Debtor's proposed interest rate, Creditor claims Debtor severely understate the fair market interest rate. Debtor's current interest rate is set at 9.25%. The proposed fixed rate is 4.25%. Creditor disputes the proposed interest rate by stating it is not fair and equitable.

While this is clearly a confirmation issue, Creditor does highlight what is coming down the confirmation pike.

Fair and Equitable

Creditor further asserts that Debtor has failed to propose fair and equitable treatment of its claim by Debtor's: (1) lack of evidence as to why 4.25% is fair and equitable; (2) loan being in substantial default; (3) lack of evidence of a rental agreement on the property; (4) lack of evidence of reliable rental income; and (5) high risk of defaulting.

These arguments by Creditor presuppose that Debtor will offer no evidence at the evidentiary hearing, if one is required. Again, Creditor highlights for Debtor the evidence Debtor will need to present at an evidentiary hearing.

It appears that the Disclosure Statement clearly discloses to Creditor what the Plan proposes and how Debtor proposes to perform it. Creditor disagrees that such Plan will be confirmed. Such dispute is for a confirmation hearing.

APPLICABLE LAW

Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

"Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A. C. Williams, supra.*

There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567 (Bank. N.D. Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *Official Comm. of Unsecured Creditors v. Michelson*, 141 B.R. 715, 718–19 (Bankr. E.D. Cal. 1992).

The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

The court begins its analysis with the statutory requirements of 11 U.S.C. § 1125 for a disclosure statement. Solicitation of an acceptance or rejection of a plan may be made with a written disclosure statement which was approved by the court. The disclosure statement must provide “adequate information.” The term “adequate information” is defined in 11 U.S.C. § 1125(a)(1) to be,

(1) “adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information;...

Determination of whether there is “adequate information” is a subjective determination made by the bankruptcy court on a case by case basis. *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988), *cert. denied* 488 U.S. 926 (1988). Non-bankruptcy rules and regulations concerning disclosures do not govern the determination of whether a disclosure statement provides adequate information. 11 U.S.C. § 1125(d); *Yell Forestry Products, Inc. v. First State Bank*, 853 F.2d 582 (8th Cir. 1988).

DISCUSSION

On its face the disclosure statement shows that adequate information has been provided. However, the court notes there are serious questions as to whether the plan will be confirmable.^{FN.1.}

FN.1. The court is concerned regarding Debtor's ability to pay the proposed plan. There being a negative monthly cash-flow of \$625.40 on the rental property and only \$996.21 of disposable income from wages. This leaves Debtor with less than a \$400.00 cushion. Thus, should anything unexpected happen to Debtor or the property, Debtor may fail to make payments. The court further notes that expenses for the Rental Property do not include any maintenance, repairs, fees, or the like. Additionally, Debtor's expenses relating to shelter, food, and transportation raise questions as to the reasonableness or accuracy of the expenses to care for three adults.

With respect to Creditor’s, Bosco Credit, LLC’s opposition of the Disclosure Statement, Creditor first fails to provide the court with the Bankruptcy Code basis which states the Debtor cannot modify the interest rate or loan term for the rental property. But notes Creditor’s concern that in terms of the future status of Debtor, no future rental agreement has been provided which would account for the future income.

At the hearing, counsel for the Debtor in Possession addressed the disposable income issues. The Parties agreed to a continuance of the hearing to allow Debtor in Possession to file an amended disclosure statement which includes the current financial information, and to allow the Parties to continue in their discussions concerning agreed terms for Creditor's claim.

October 18, 2021 Stipulation

Stipulation Resolving Objection

On October 18, 2021, a Stipulation was filed that resolved Creditor's Objections. Creditor having stated the Disclosure Statement and anticipated substantive confirmation issues, both Creditor and Debtor worked to a resolution.

The basic terms of the Stipulation are:

1. Creditor's Claim is \$171,576.84.
2. A payment of \$2,500 will be made on or before November 1, 2021 (which is prior to confirmation of the Plan).
3. The interest rate on the claim shall be 5% per annum, with the repayment amortized over 30 years, for a monthly principal and interest payment of \$900.64.
4. Debtor will make monthly principal and interest payments of \$900.64 which commence November 1, 2021.
5. Pre and Post Default Confirmation Provisions are stated.
6. The automatic stay provisions terminated on confirmation.
7. The Stipulation constitutes a ballot for the Chapter 11 Plan as amended to provide for Creditor as stated in the Stipulation.

Dckt. 79.

The terms of the Stipulation appear to be commercially and bankruptcy reasonable, and the result of a good faith legal and economic negotiation.

October 20, 2021 Monthly Operating Report

On October 20, 2021, Debtor filed a monthly operating report with supporting exhibits disclosing their current financial information.

October 28, 2021 Hearing

As reviewed above, this bankruptcy case has been filed to address a long dormant, but not invalid, secured debt. That Creditor and Debtor reached commercially reasonable terms to allow Debtor

to try and perform under those terms, which giving Creditor solid bankruptcy lines (and the stay being terminated) going forward. Which this commercially and economically appearing (as this is only the disclosure statement hearing) terms resolving the lack of adequate information objection, it appears that adequate information is now had by all.

An Amended Disclosure Statement and Amended Plan which incorporate the terms of the Stipulation between Debtor and Creditor will be filed on or before **XXXXXXX**, 2021.

At the hearing, **XXXXXXXXXXXX**

The Amended Disclosure Statement is approved. The court shall issue an order approving the Disclosure Statement, which shall also set the following dates and deadlines:

- A. Alejandro Alejandro and Griselda Gonzalez, the “Plan Proponent” Debtor in Possession, shall serve the approved Amended Disclosure Statement, proposed Amended Plan, notice of confirmation hearing, a copy of this order approving the disclosure statement, and ballot on or before **xxxxx, 2021**.
- B. Ballots shall be returned to counsel for the Plan Proponent on objections to confirmation, if any, filed and served on or before **xxxxx, 2021**.
- C. The Ballot Tabulation Summary, evidence in support of confirmation, and Responses to objections to confirmation, if any, shall be filed and served on or before **xxxxx, 2021**.
- D. The Confirmation Hearing shall be conducted at **11:30 a.m.** on **xxxxx, 202--**.